

From: Ricker, Monique T. EOP/USTR Monique_T_Ricker@ustr.eop.gov
Subject: RE: FOIA Request (USTR-19-0333)
Date: April 2, 2019 at 12:36 PM
To: American Oversight FOIA foia@americanoversight.org
Cc: FN-USTR-FOIA FN-USTR-FOIA@ustr.eop.gov



Katie,

This email is the final response of the Office of the United States Trade Representative (USTR) to Freedom of Information Act (FOIA) No. FY19-68 submitted on March 8, 2019 requesting all email communications about Saudi Arabia or national security matters related to nuclear proliferation between USTR and Derek Harvey, K.T. McFarland, or Michael Flynn since January 20, 2017.

On March 11, 2019, USTR searched the files of Ambassador Robert Lighthizer, Director of Scheduling & Advance Abigail Bacak, Chief of Staff (CoS) Jamieson Greer, Deputy CoS Pamela Marcus, Deputy CoS Steward Ackerly, Deputy USTR Jeff Gerrish, Deputy USTR C.J. Mahoney, Deputy USTR Dennis Shea, General Counsel Stephen Vaughn, and Deputy General Counsel Maria Pagan and Juan Millan. In addition to the four email addresses American Oversight provided to USTR, we searched for the following variations on names: "Derek Harvey," "Derek J. Harvey," "Harvey, Derek," "K.T. McFarland," "McFarland, Kathleen," "McFarland, K.T.," "Michael Flynn," "Michael T. Flynn," or "Flynn, Michael."

USTR located no records responsive to your request.

This constitutes a complete response to your request. You may contact me or my colleague Melissa Keppel at FOIA@ustr.eop.gov or 202-395-3419 for further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with the response to this request, you may also administratively appeal by writing to: FOIA Office, ATTN: Janice Kaye, Office of the US Trade Representative, Anacostia Naval Annex, Bldg. 410/Door 123, 250 Murray Lane, S.W., Washington, D.C. 20509.

Your appeal must be postmarked or electronically transmitted within 90 days of the date of the response to your request. Both the letter and the envelope should be clearly marked: "Freedom of Information Act Appeal" and should include a reference to the FOIA Case File number listed above. Heightened security in force may delay mail delivery; therefore we suggest that you also email any such appeal to foia@ustr.eop.gov.

In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, where we searched for the records you requested.

Thank you,
Monique

Monique T. Ricker
FOIA Program Manager/Attorney

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON DC 20508

From: American Oversight FOIA <foia@americanoversight.org>
Sent: Friday, March 8, 2019 11:31 AM
To: FN-USTR-FOIA <FN-USTR-FOIA@ustr.eop.gov>
Subject: [EXTERNAL] FOIA Request (USTR-19-0333)

Dear FOIA Officer:

Please find attached, and pasted below, a request for records under the Freedom of Information Act.

Sincerely,

Clay M. Goode
Paralegal
American Oversight
foia@americanoversight.org
www.americanoversight.org | @weareoversight

FOIA: USTR-19-0333

March 8, 2019

VIA ELECTRONIC MAIL

USTR FOIA Office, GSD/RDF

Attn: Chief FOIA Officer Janice Kaye

Office of the U.S. Trade Representative

Anacostia Naval Annex, Building 410/Door 123,

250 Murray Lane SW

Washington, DC 20509

FOIA@ustr.eop.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and your agency's implementing regulations, American Oversight makes the following request for records.

A recent report by the House of Representatives Committee on Oversight and Reform details how senior White House officials in the early days of the Trump administration worked outside standard policymaking processes to advance a nuclear exports plan involving sharing nuclear technology with Saudi Arabia.^[1] The report highlights serious conflict-of-interest concerns and extensive undue influence from officials outside government. It also notes that President Trump reportedly held a meeting on the topic of sharing nuclear technology with Saudi Arabia as recently as February 12, 2019.

American Oversight seeks records to shed light on the degree and nature of outside influence on national security matters related to nuclear proliferation.

Requested Records

American Oversight requests that the United States Trade Representative (USTR) produce the following within twenty days:

All records reflecting communications (including email messages, email attachments, calendar invitations or entries) with any of the following individuals or organizations:

- a. Derek Harvey, including but not limited to the email addresses derek.j.harvey@nsc.eop.gov and derek.harvey@mail.house.gov
- b. K.T. McFarland, including but not limited to the email address k.t.mcfarland@nsc.eop.gov
- c. Michael Flynn, including but not limited to the email address Michael.t.flynn@nsc.eop.gov

American Oversight requests that USTR search the files of the following custodians for records responsive to this request:

- i. United States Trade Representative Robert Lighthizer and anyone corresponding on his behalf, such as executive assistants or schedulers;

- ii. Chief of Staff Jamieson Greer;
- iii. Deputy Chief of Staff Pamela Marcus;
- iv. Deputy Chief of Staff Steward Ackerly;
- v. Deputy United States Trade Representative Jeff Gerrish;
- vi. Deputy United States Trade Representative C.J. Mahoney;
- vii. Deputy United States Trade Representative and Chief of Mission, Geneva, Dennis Shea;
- viii. General Counsel Stephen Vaughn; and
- ix. Anyone serving in the role of Principal Deputy General Counsel or Deputy General Counsel.

Please provide all responsive records from January 20, 2017, through the date the search is conducted.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.[\[2\]](#) **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.[\[3\]](#)**

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered your agency’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**[\[4\]](#) Furthermore, agencies that have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”^[5] If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”^[6] Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”^[7] Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”^[8]

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.^[9] Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight hopes to decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency’s implementing regulations, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to public understanding of those operations. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of activities of the government. The disclosure of the information sought under this request will reveal the operations of the federal government, including the administration’s policymaking activities and international relations related to nuclear technology. There is significant interest in knowing what actions the government took in this sensitive area,^[10] and the records responsive to this request will contribute significantly to the public’s understanding of the government’s activities.

This request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.^[11] American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,^[12] American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.^[13] As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.^[14]

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Katherine Anthony at foia@americanoversight.org or (202) 897-3918. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

Austin R. Evers

Executive Director

American Oversight

[1] Interim Staff Report, Committee on Oversight and Reform, *Whistleblowers Raise Grave Concerns with Trump Administration’s Efforts to Transfer Sensitive Nuclear Technology to Saudi Arabia*, U.S. HOUSE OF REPRESENTATIVES, Feb. 2019, ><https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Trump%20Saudi%20Nuclear%20Report%20-%202-19-2019.pdf><.

[2] See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

[3] See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

[4] Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), ><https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records><; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), ><https://www.archives.gov/files/records-mgmt/m-12-18.pdf><.

[5] FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

[6] *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

[7] *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

[8] *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

[9] *Mead Data Central*, 566 F.2d at 261.

[10] See, e.g., House Committee on Oversight and Reform, *supra* note 1; Matthew Fuhrmann, *The Trump Administration Wants to Sell Nuclear Technology to the Saudis – Without a Nuclear Agreement. That’s Alarming.*, WASH. POST, Feb. 21, 2019, >https://www.washingtonpost.com/politics/2019/02/21/trump-administration-wants-sell-nuclear-technology-saudis-without-nuclear-agreement-thats-alarming/?utm_term=.9ae43fa642bb<; Christal Hayes, *Trump Administration Pushed for Sale of Nuclear Plants to Saudi Arabia, Democrats Say in Report*, USA TODAY (Feb. 19, 2019, 5:45 PM), ><https://www.usatoday.com/story/news/world/2019/02/19/trump-administration-sell-nuclear-plants-saudi-arabia/2917357002/><; David Volodzko, *Saudi Arabia and the Dark Side of Trump’s Manufacturing Plan*, FORBES (Feb. 26, 2019, 11:39 AM), ><https://www.forbes.com/sites/davidvolodzko/2019/02/26/americas-favorite-cowboy-saudi-arabia-and-the-dark-side-of-trumps-manufacturing-plan/#47b60c827724><.

[11] American Oversight currently has approximately 12,200 page likes on Facebook and 51,000 followers on Twitter. American Oversight, FACEBOOK, ><https://www.facebook.com/weareoversight/>< (last visited Mar. 6, 2019); American Oversight (@weareoversight), TWITTER, ><https://twitter.com/weareoversight>< (last visited Mar. 6, 2019).

[12] *DOJ Records Relating to Solicitor General Noel Francisco’s Recusal*, AMERICAN OVERSIGHT, ><https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance><.

[13] *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, ><https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents><.

[14] *Audit the Wall*, AMERICAN OVERSIGHT, ><https://www.americanoversight.org/investigation/audit-the-wall><.